Office-Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant,

VS.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., *et al,*
Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM DECISION OF THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

Appellee, Getty Oil Company,[1] seeks dismissal of the appeal herein and/or affirmance of the decision of the Supreme Court of Mississippi on the ground that the appeal does not raise a substantial question requiring the consideration of this Honorable Court.

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[1]The following companies are parent companies, subsidiaries, and affiliates of the Appellee, Getty Oil Company: Texaco, Inc.

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Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM DECISION OF THE SUPREME COURT OF THE UNITED STATES

Getty Oil Corporation, one of the Appellees herein, files this Motion, respectfully requesting this Honorable Court to dismiss the appeal herein, or in the alternative, to affirm the decision and judgment of the Supreme Court of Mississippi in *Transcontinental Gas Pipe Line v. State Oil and Gas Board of Mississippi*, 457 So.2d 1298 (Miss. 1984). In support of this Motion, Appellee, Getty Oil Corporation, submits that this appeal does not raise a substantial federal

question which necessitates consideration by this Honorable Court.

STATEMENT OF THE CASE

Appellee does not take issue with the statement of the case as set forth in Appellant's jurisdictional statement, except for Appellant's statement that the Board's order had the practical effect of forcing Transco to take quantities of high cost gas it had no contractual obligation to take.

The Board's order did not force Transco to take quantities of high cost gas it had no contractual obligation to take. Transco could elect to take no gas at all. The Board's order merely provided that if Transco elected to take any gas from the pool, it should take ratably without discrimination in favor of one owner against another. If Transco elected to take gas from one owner, it had to take gas from all owners. The Mississippi Supreme Court's ruling is that Transco could only be required to take without discrimination as to quantity; Transco is not required to pay a nondiscriminatory price. Presumably, Transco will pay the market clearing price for gas belonging to parties with whom it does not have a sales contract establishing the price.[2]

Additional facts are helpful in determining the purpose of Rule 48 and the Natural Gas Policy Act of 1978 (NGPA).

1. The physical properties of gas make it necessary to regulate the taking of gas from reservoirs so that each party owning an interest in a gas reservoir will obtain his fair share of production. The problem presented in this case is described in a similar ratable take case, *Northern Natural Gas Co. v. State Corporation Comm.*, 362 P.2d 599 (Kan. 1961), rev'd 372 U.S. 84 (1963):

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[2]Market clearing price means a price which Transco can pay to producers which will not be too high to sell to its customers.

> We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were loosing the right to produce gas from the common source of supply to the great damage of the owners of the wells and the loss of their correlative rights.
>
> While members of this Court make no claim to be experts in the science of the production of natural gas, we believe that the Court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field or source will be able to produce much less gas and the owners of such wells will have suffered a definite loss.

Prior to July, 1982, Transco took all of the gas produced from the six wells completed in the Harper Sand Gas Pool. As a result, it took ratably from each well and each owner in each well received his fair share of production from the pool. After Transco refused to take gas that it was not contractually obligated to take, disproportionate withdrawals of gas resulted. Transco was obligated to take all of the gas produced from the Florida Exploration 29-1 Well and the Florida Exploration - Carlisle 4-2 Well and as a result took all of the gas those two wells were capable of producing. Accordingly, Transco took one hundred percent of the allowable for these two wells.[3] Transco did not have gas sales

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[3]Rules 33 and 34 promulgated by the Mississippi State Oil and Gas Board base the amount of gas a well may produce upon the amount of gas it is capable of producing; this allowed producing rate is called the well's allowable.

contracts with all of the owners of interests in the other four wells, namely the Getty-Rogers 28-11 Well, the Getty-Sipp 20-9 Well, the Getty-Buckley 33-6 Well and the Tomlinson-Willoughby 3-5 Well. Consequently, it only took gas from these four wells in proportion to the amount of interests in each well that it was contractually obligated to take. For example, if Transco had gas sales contracts with owners of approximately seventy percent of the gas in a well, Transco took an amount of gas from this well equal to seventy percent of the well's allowable. The result was that gas was drained from the underproduced Getty operated units to the Florida Exploration operated units, whose production was not cut back.

Coastal Exploration, Inc., the owner of a small interest in the Getty operated units, did not have a gas sales contract with Transco and initiated the instant suit by filing a petition with the Mississippi State Oil and Gas Board seeking, among other matters, to require Transco to take ratably the gas of all parties so that it could obtain its share of production from the pool.

2. The Natural Gas Policy Act was enacted as a result of the gas shortage in the 1970's. Subsequent to the *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) decision, and prior to the enactment of the NGPA in 1978, no interstate pipeline company would purchase gas without the approval of the Federal Power Commission (FPC). Through its power to approve or disapprove the sale of gas in interstate commerce, the FPC could control the price of gas sold in interstate commerce. During this period, the FPC could also prevent a producer from withdrawing its gas from interstate commerce without abandonment authorization from the FPC.

This FPC regulation was onerous to the producer. A producer was reluctant to sell its gas in interstate commerce because it had to have FPC approval to do so and once it was sold in interstate commerce it could not remove without permission of the FPC. Furthermore, the FPC, through its approval power, kept the price of gas artificially low. As a result, the producer had little incentive to explore for additional gas reserves. This decline in exploration for new gas reserves resulted in diminishing gas reserves in this country. By the 1970's, there was a shortage of deliverable gas. When new gas reserves were discovered they were often sold in the unregulated intrastate market where they could be sold at market value and without the regulatory impediments the FPC imposed on gas sold in interstate commerce. One of the purposes of the NGPA was to remove the disparity between the interstate and intrastate markets. This was in part accomplished by Section 601 which deregulated high cost gas sold in interstate commerce.

THE QUESTIONS ARE NOT SUBSTANTIAL

I. State "Ratable Take" Regulations of Unregulated High Cost Gas Are Not Preempted by Federal Regulations of Natural Gas Purchased.

Transco contends that the enactment of the NGPA raises a substantial question of whether Congress, by deregulating prices of the first sales of certain categories of gas, intended to allow states to regulate the quantity and price of gas purchased by an interstate pipe line and transported for sale in the interstate market. The question as applied to this case is not properly posed. Congress not only deregulated the price of high cost gas, in Section 601 of the NGPA it also removed the first sales of deregulated high cost gas from the jurisdiction of FERC. FERC no longer has any authority to approve or disapprove of the first sale of high cost gas into

interstate commerce. Likewise, it no longer has jurisdiction to require that said gas, once sold in interstate commerce, remain in interstate commerce. A producer does not have to get FERC approval to take gas out of interstate commerce through abandonment proceedings. The question is whether state regulatory agencies can again require interstate pipelines to purchase ratably high cost gas deregulated under the NGPA. The following authorities indicate the NGPA removed first sales of high cost gas from FERC jurisdiction, thereby allowing state regulatory agencies to resume ratable take jurisdiction which these agencies exercised prior to *Northern Natural Gas Co. v. State Corporation Comm'n.*, 372 U.S. 84 (1963).

Transco asserts that the Board may not issue a ratable take order affecting an interstate gas pipeline without running afoul of the doctrine of federal preemption. Transco claims that the jurisdiction of the FERC is so sweeping that it extends to all wellhead purchases of gas by the interstate pipelines FERC regulates. The power of FERC to regulate sales of gas in interstate commerce, however, is defined by and limited to the powers delegated to it by the Natural Gas Act.[4] FERC's NGA jurisdiction, in turn, has been so circumscribed by the Natural Gas Policy Act[5] that its jurisdiction over Transco does not attach until the Transportation link of the Pipeline's system.

Section 1 (b) of the Natural Gas Act, 15 U.S.C.A. § 717 (b), the jurisdictional section of said Act, clearly defines the scope of the Natural Gas Act, to-wit:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the

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[4]15 U.S.C.A. §§ 717-717z.

[5]15 U.S.C.A. §§ 3301-3432.

> sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

In 1947, the United States Supreme Court, in *Panhandle Eastern Pipeline Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), examined Section 1(b) of the Natural Gas Act and defined the powers granted to the Federal Power Commission:

> This section [Section 1 (b)] determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its regulatory power, delegated by the act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

Id. at 516. This statement was quoted with approval in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

Based upon the language of the Natural Gas Act itself, as well as the abovementioned cases, it is clear that the Commission's jurisdiction, although wide ranging, is less than plenary. The Commission's grant of jurisdiction flows from Section 1 (b) of the Natural Gas Act. It can regulate the activities of producers and pipelines only insofar as it is permitted to do so by the Act.

Aside from the question of preemption by the Federal Government, the constitutionality of ratable take statutes and orders directed at non-producing purchasers has never been challenged.

Regarding federal preemption of state ratable take orders, in *Northern Natural Gas Co. v. Corporation Commission of Kansas*, 372 U.S. 84 (1963), the United States Supreme Court decided that the orders of the Kansas State Corporation Commission which required an interstate pipeline company to purchase gas ratably from all wells connected with its pipeline system in each gas field within the state invalidly encroached upon the exclusive regulatory jurisdiction of the Federal Power Commission conferred by the Natural Gas Act. The Court held as it did because at that time, the Federal Power Commission, by virtue of the Natural Gas Act and the Supreme Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), which applied the Natural Gas Act to sales of gas from independent producers to interstate pipelines, was given exclusive jurisdiction over the sale and transportation of natural gas in interstate commerce for resale. No interstate pipeline company could purchase gas without the approval of the FPC. The FPC controlled the price paid for gas in acquisitions by pipeline companies. Under the regulatory scheme created by the Natural Gas Act, no room was left either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result. State ratable take orders, in the opinion of the Supreme Court, affected the ability of the Federal Government, acting through the Federal Power Commission, "to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." (372 U.S. at 91-92).

It should be noted, however, that the *Northern Natural* decision did not purport to overturn *Cities Service v. Peerless*, which upheld the constitutionality of state ratable take orders. In a footnote, the Court stated:

> Our decisions in *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U.S. 179, 95 L.Ed. 190, 71 S.Ct. 215, and *Phillips Petroleum Company v. Oklahoma*, 340 U.S. 190, 95 L.Ed. 204, 71 S.Ct. 221, are not contrary. 'In those cases, we were dealing with constitutional questions and not the construction of the Natural Gas Act.' *Natural Gas Pipeline Company v. Panoma Corp., supra*, (349 U.S. at 45).

372 U.S. at 91, n. 10.

However, since all of the wells completed into and producing from the Harper Sand Gas Pool have been classified by the State Oil and Gas Board as deep, high cost gas wells under Section 107(c) of the Natural Gas Policy Act of 1978,[6] and the gas from these wells was not dedicated to interstate commerce on November 8, 1978, the gas produced from these wells does not come within the ambit of the Natural Gas Act, and consequently, the *Northern Natural* decision is not applicable to this case.

Section 1(b) of the Natural Gas Act of 1938, *supra*, conferred upon the Federal Power Commission's exclusive jurisdiction over the sale and transportation of gas in interstate commerce. Section 601 of the Natural Gas Policy Act of 1978,[7] provides that as to all high cost natural gas as defined in Section 107(c), "for purposes of Section 1 (b) of the Natural Gas Act, the provisions of such act and the jurisdiction of the Commission (FERC) under such act" are not applicable.

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[6]15 U.S.C.A. § 3317 (c); (A-61).

[7]15 U.S.C.A. § 3431.

This means that FERC has no jurisdiction over the field sales of deregulated gas which is the subject of this litigation.

The legislative history of the Natural Gas Policy Act amplifies Section 601 by stating:

> Natural gas not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act is never made subject to the Commission's jurisdiction under Sec. 1 (b) of the Natural Gas Act.
>
> The commission's jurisdiction under Section 1 (b) of the Natural Gas Act ceases on the first day of the first month beginning after the date of enactment of this Act for the following categories of natural gas:
>
> 1. High cost natural gas which qualifies for deregulation price treatment under Section 107(c).

7 U.S. Code Cong. and Adm. News, 1978 at 9040.

In *Conoco, Inc. v. Federal Energy Regulatory Commission*, 622 F.2d 796, (5th Cir. 1980), the Fifth Circuit explained the effect of Section 601:

> Section 601 (a) of NGPA, 15 U.S.C.A. Section 3431 (a), exempts certain categories of natural gas from the jurisdiction of FERC and the requirement of obtaining a certificate of public necessity under NGA. . . . It is clear from Section 601 that Congress intended to free certain natural gas from FERC jurisdiction, while leaving other gas subject to that jurisdiction.

Id. at 797, and 799.

In *Tenneco, Inc. v. Sutton*, 530 F.Supp. 411 (M.D.La.1981), the District Court there succinctly summarized the effect of the NGPA:

> THE NGPA is basically an overlay of the NGA since the NGA remains applicable to interstate transportation and interstate sales for resale, *unless a specific exclusion of the NGA jurisdiction is provided.* The NGPA eliminates many of the NGA's price and nonprice producer regulations. Under the provisions of the NGPA, the NGA is inapplicable after November 3 1980 [sic], to first sales of natural gas which were not committed or dedicated to interstate commerce on November 8, 1978, and to first sales of committed or dedicated gas which have been determined to be new natural gas, new onshore production well gas, or within certain categories of high cost gas. These provisions remove the Commission's authority to establish just and reasonable prices under the NGA for producer sales into the interstate market and to indirectly regulate these sales through control of the interstate pipeline purchaser's pass-through of purchase gas costs. These provisions also relieve producers of gas not committed or dedicated to interstate commerce and gas in the new natural gas and new onshore production well categories and certain high cost categories, from any requirement of receiving certification or abandonment authorization, or of making rate filings under the NGA.
>
> Impediments to producer sales into the interstate market of natural gas which was not committed to that market at the time the NGPA was enacted are eliminated.

Id. at 419. (Emphasis added).

Transco argues that since sales of natural gas by interstate pipelines to distribution companies continue to be regulated, such regulation is sufficient to confer exclusive

federal jurisdiction over the present issue. However, Section 601(b)[8] of the NGPA provides that "for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if . . . there is no applicable maximum lawful price solely by reason of the elimination of price control." (Sections 4 and 5 of the Natural Gas Act, 15 U.S.C.A. §§ 717c and d, require that all rates in connection with the sale or transportation of a natural gas shall be just and reasonable). Furthermore, Section 601(c)[9] states that FERC may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if . . . such amount is deemed to be just and reasonable for purposes of section 4 and 5 of such Act . . . except to the extent "the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds." *Associated Gas Distributors v. FERC*, 706 F.2d 344, 345 (D.C.Cir. 1983).

In the preamble to its interim rules implementing the Natural Gas Policy Act, FERC explained the effect of the NGPA upon continued NGA regulation:

> If gas is not committed or dedicated to interstate commerce as defined in Section 2(18) or is exempted from the jurisdiction of the NGA under Section 601(a) (1) (B) as high cost natural gas, new natural gas, or natural gas produced from any new onshore production well, the prior framework of utility type regulation under the NGA no longer applies.
>
> If natural gas sales are freed from the requirements of the NGA, several adjuncts to NGA regulation are obvi-

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[8]15 U.S.C.A. § 3431 (b).

[9]15 U.S.C.A. § 3431 (c).

ated. First, there is no longer any necessity for a producer to seek certification of the sale as serving the public convenience and necessity. The replacement for this requirement under the NGPA is limited to the prior determination mechanism, where applicable, and the pricing limits established in the NGPA. New sales of such gas in interstate commerce no longer require certification as a prerequisite to commencement of deliveries. Nor does the requirement for abandonment authorization before termination of deliveries of natural gas exist with respect to natural gas no longer subject to NGA regulation. In the case of first sales of natural gas not previously committed or dedicated to interstate commerce or exempted from NGA regulation, tariff filings and rate increase applications are dispensed with. (Of course, specific requirements for filing to establish the right to collect the maximum lawful price levels exist under the regulations and annual reporting will be required under the NGPA in many instances. However, the nature of these filings, which are in many cases one-time notification type filings, is quite different from the rate filings previously required under the NGA.

Indirectly, NGA regulation is affected by the operation of Section 601 (b) and (c) of the NGPA. Section 601 (b) provides that any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if such amount does not exceed the maximum lawful ceilings established by the NGPA or if there is no maximum lawful price applicable by reason of elimination of price controls, Section 601(c), the guaranteed pass-through provision, states that the Commission may not deny, or condition the grant of any certificate under Section 7 of the NGA based upon the amount paid in any sale of

> natural gas if the amount paid meets the standard of Section 601(b) and is, therefore, by statutory fiat, just and reasonable. Additionally, the Commission may only deny recovery by any interstate pipeline of any amount paid with respect to the purchase of natural gas under Section 601 (b) to the extent the Commission determines that the amount paid was excessive due to fraud, abuse or similar grounds.

43 Fed.Reg. 56455-58, Dec. 1, 1978.

Moreover, with respect to the status of pipeline purchasers of deregulated gas, Section 601 (a) (1) (D)[10] of the Natural Gas Policy Act provides as follows:

> D. Natural Gas Company—For purposes of the Natural Gas Act, the term "natural gas company" (as defined in Section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

Section 2 (6)[11] of the Natural Gas Act defines a "natural gas company" as "a person engaged in the transportation of natural gas in interstate commerce, for the sale in interstate commerce of such gas for resale."

Read together, these statutory passages directly affect Transco's status as a purchaser of natural gas. When Transco purchases gas which is removed from FERC's jurisdiction by Section 601 (a) (1) (A), (B), or (C), as to those purchases, Transco, too, is removed from the FERC's NGA

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[10]15 U.S.C.A. § 3431 (a) (1) (D).

[11]15 U.S.C.A. § 717a(6).

jurisdiction, for it is no longer a "natural gas company" subject to FERC's jurisdiction under the NGA. Although FERC's NGA jurisdiction over Transco remains as to the *transportation* of gas in interstate commerce, the NGPA expressly provides that Transco, as a purchaser of this deregulated gas, is not regulated by FERC.

Thus, the *Northern Natural* decision is clearly inapplicable as to Transco's purchases of deregulated gas such as the Harper Sand Gas Pool. Both the gas in question and the pipeline which purchases it are, by the operation of the Natural Gas Policy Act, removed from the ambit of the Natural Gas Act. With respect to deregulated gas, FERC's jurisdiction over Transco's activities begins in the transportation link of the interstate pipeline system. Transco's field purchases of deregulated gas are not regulated by the Commission. FERC's authority, which is defined by Section 1 (b) of the Natural Gas Act, and which is circumscribed by the operation of the Natural Gas Policy Act, does not, in the case of deregulated gas, back up to the wellhead. Such an assertion is, when read in light of the applicable statutes, impossible. Such an interpretation of the NGPA would make Section 601 and the intent of Congress in enacting the NGPA meaningless.

In *Public Service Commission of New York v. Mid-Louisiana Gas Co.*, —U.S.—, 77 L.Ed.2d 668 (1983), the Supreme Court examined in detail the history of regulation by the federal government of the natural gas industry. In so doing, the Court observed that the NGPA took FERC out of the business of regulating field purchases of natural gas by pipelines:

> The NGPA is designed to preserve the Commission's authority under the NGA to regulate natural gas sales from pipelines to their customers; however, it is de-

> signed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called 'first sales' of natural gas.

Id. at 678.

The only possible reason that can be given for preemption is the possible impact that the Board's order may have on Transco's resale prices. This is because FERC can in no way regulate Transco's field purchasing practices. No longer must Transco obtain a certificate of convenience and necessity before it may purchase the gas it transports in interstate commerce. No longer must a certificate of abandonment be obtained to remove gas from the interstate market. No longer is there justification to preempt a state's ratable take order on the ground that it might disrupt the federally controlled pricing scheme for natural gas, because this scheme no longer exists as to deregulated gas. The NGPA allows Transco to buy Section 107 gas at any price in order to meet its supply obligations. Only if FERC finds that Transco's purchase costs are excessively inflated due to fraud or abuse may its resale rates be reduced.

Transco cites no authority for the proposition that FERC has jurisdiction over wellhead sales of gas expressly deregulated by the NGPA. These cases merely set forth the general rule that when Congress intends for FERC to occupy a field, then the states cannot regulate that field. Getty does not take issue with this principle. However, it does disagree with Transco's contention that Congress, after the NGPA, intends to occupy the field of first sales of deregulated gas. The NGPA, the preamble to the interim rules, the foregoing cases, and the history of the gas shortage leading up to the NGPA all clearly indicate that Congress intended to remove FERC jurisdiction from first sales of deregulated gas.

In *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), the Supreme Court stated that a state law is preempted if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." And in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), the Court noted that the test of preemption is whether "the matter on which the State asserts the right to act is in any way regulated by the federal government." Here, it is the stated objective of Congress to increase the supply of gas in the interstate market by removing certain categories of gas from the web of FERC's jurisdiction. Congress has expressly removed from FERC's purview wellhead sales of deregulated gas.

Furthermore, Transco's assertion that Order No. 409-82 interferes with FERC's pervasive interest in regulation of the sale of natural gas in interstate commerce does not by itself lead to the conclusion that the Board is preempted from applying Rule 48 to an interstate gas pipeline. In *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, —U.S.—, 76 L.Ed.2d 1 (1983), AECC and the United States, as amicus curiae, argued that the Arkansas PSC's assertion of jurisdiction interfered with the federal Rural Electrification Administration's "pervasive involvement in the management of the rural power cooperatives to which it loans funds, and may frustrate important federal interests." (*Id.* at 11). The Court ignored this broad assertion and instead analyzed the true relation between the Rural Electrification Act and state regulatory jurisdiction over wholesale electricity rates as explained in the legislative history of that Act:

> Contrary to the suggestion in the dissent, we do not infer from this legislative history that Congress either 'authorized' or 'expected' state regulation that this Court had barred states from engaging in. [Citations omitted]. The relevant inquiry, however, is not whether

> Congress authorized or expected such regulation, but whether it intended by its own actions to *forbid* it. Cf. *Pacific Gas & Elec. Co. v. State Energy Resources Development Comm'n.*, 461 —U.S.— 76 L.Ed.2d—, 103 S.Ct.—(1983). In answering that question, we look quite naturally to whether Congress intended in any way to forbid state regulation of rural power cooperatives.

Id. at 12, n. 11.

The message from Congress is not only clear, but is paramount: FERC's jurisdiction over Transco's field purchases of deregulated gas does not begin until after said gas has entered the transportation link of the interstate gas pipeline system. Since there is no jurisdiction, there is nothing to preempt, and Rule 48 and Order No. 409-82 do not violate the Supremacy Clause of the Constitution.

II. Rule 48 and Order No. 409-82 in No Way Constitute an Undue Burden on Interstate Commerce.

Transco's attempt to make a commerce clause issue is based upon five erroneous assumptions.

First, Transco argues that Rule 48 requires it to take high cost gas that it is not contractually obligated to take. The Mississippi Supreme Court construed Rule 48 as only requiring Transco to take (quantities) ratably from all owners. It expressly stated that Rule 48 did not deal with price discrimination and that Transco would not be required to pay the Getty $7.90/MM Btu price that Coastal sought. Rule 48 in no way establishes the price to be paid for the uncommitted gas. Presumably Transco will pay the market value for this gas.

Secondly, Transco claims that any commerce clause inquiry must consider take or pay provisions. Take or pay

provisions as noted by Transco, have been in interstate contract provisions for many years. They are the result of a bargain to satisfy the needs of both the producer and the purchaser. The producer wants a predictable and regular flow of money from his well so that he can handle debt financing and other business needs. The purchaser wants relief from the obligation to take a fixed quantity of gas from a well each month, since the ability of the purchaser, to dispose of the gas depends upon the weather and other unpredictable factors. The compromise is the take or pay provision which gives the producer a steady flow of income and at the same time allows the purchaser the flexibility to reduce takes at times when it cannot market high volumes of gas and thereby allows him to take "make up" gas at a later time when he has an increased need for gas. Although the purchaser must pay for gas not taken up to the contract minimum, when he later takes that gas (make up gas), he doesn't pay for it since he has already paid for it. The only burden on the purchaser is the loss of use of the money from the time he pays for the gas and the later date that he actually takes the gas. This burden is apparently one that the purchaser is willing to assume to obtain flexibility in the takes of gas. At the hearing before the Board, Transco's witness admitted that it was aware of Rule 48 when it executed the gas contracts involved in the case. Transco cannot complain because it willingly included take or pay provisions in these contracts. The consumer cannot complain because these provisions were necessary to obtain the gas which, at the time these contracts were executed, was in short supply. Take or pay provisions in gas contracts are in wide use in all producing states and are not an undue burden on interstate commerce.

Third, Transco alleges that it is forced to take additional volumes of gas. Rule 48 does not force Transco to take any

volume of gas. It merely states that if Transco elects to take any gas, it shall take ratably from all owners. The volumes of gas that Transco takes depends solely upon Transco's choice. The Mississippi statute cited in Transco's brief (Miss. Code Ann. § 53-1-1 (1972)), relates to the amount that a well is *allowed* to produce. There is no statute or rule that requires the well to be produced at the allowable or at any other rate.

Fourth, Transco contends that Mississippi should have regulated producers instead of purchasers. This approach would not have protected the rights of all parties in the pool. Purchasers control production because a producer can deliver only that amount of gas that a pipeline will allow into its lines. Transco's witness stated in the hearing before the Mississippi State Oil and Gas Board that Transco would not take any gas that it was not contractually obligated to take unless the Board ordered it to do so. Since Transco has different percentages of committed gas in different units, the result will be undue drainage between units. The owners of interests in the underproduced units will not get their fair share of production.

Fifth, Transco says that Congress provided price escalation and price deregulation in the NGPA to encourage exploration. This is true in part. It did approve price escalations and price deregulation as an incentive, but it further provided complete deregulation of first sales of high cost (Section 107) gas. Artificially low prices were only part of the regulatory burdens that caused producers to avoid the interstate market. Also annoying to producers were the regulations which prohibit sales into the interstate market without FERC (FPC) approval or removal of gas from the interstate market with FERC approval. To encourage producers to plan high cost gas producers to send gas into the

interstate market it removed the first sales of this gas from *all* FERC regulation.

This Court has previously upheld state ratable take orders such as Statewide Rule 48 when those orders were challenged under the Commerce Clause. *Cities Service Gas Company v. Peerless Oil and Gas Co.*, 340 U.S. 179 (1950). Moreover, the holding in *Cities Service* that a ratable take order does not violate the Commerce Clause was specifically approved in this Court's decision in *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963), upon which Transco relies so heavily in its jurisdictional statement. Nevertheless, Transco now asks this Court to ignore these precedents and find Statewide Rule 48 in violation of the Commerce Clause.

In *Pike v. Bruce Church*, 397 U.S. 137 (1970), this Court set forth the following test to be applied in Commerce Clause challenges:

> Where the statute regulated evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142.

Thus, applying the first part of the *Pike* test, a state regulation will be upheld where:

1. It regulates evenhandedly to effectuate a legitimate local public interest; and,

2. Its effects on interstate commerce are only incidental.

It is absurd to say that Statewide Rule 48 discriminates against Transco or any interstate company in favor of Mississippi producers. This rule applies evenhandedly to all field producers of oil and gas, be they interstate pipeline or local oil purchasers. Furthermore, Statewide Rule 48 does not restrict the flow of natural gas into the interstate market, a result of state regulation which was condemned in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), where a West Virginia statute required domestic gas producers to supply local needs first before allowing the surplus gas, if any, into the interstate market. Nor does it threaten to withdraw large reserves of natural gas from the interstate market as did the Oklahoma Corporation Commission's order in *FPC v. Corporation Commission*, 362 F.Supp. 522 (W.D. Okla.1973), *aff'd.* 415 U.S. 961 (1974). The Commerce Clause was meant to protect against the burdens on interstate commerce condemned in the above mentioned cases, and not against state ratable take requirements.

On the contrary, Rule 48 is a uniform, evenhanded prohibition on discriminatory purchasing practices by purchasers from a pool. Any purchaser, whether interstate or intrastate in nature, is subject to Statewide Rule 48, regardless of the purpose for which the gas is purchased. Furthermore, Statewide Rule 48 does not require Transco to purchase any set volumes of gas. It may take one hundred percent, fifty percent, or none. Transco's only obligation is that once it decides to take gas from a pool, it must take those quantifies ratably from the wells and the owners who offer their gas for sale. There is nothing in Statewide Rule

48 that requires Transco to increase its take in Mississippi over those in Louisiana or Texas, as Transco claims.

Moreover, Transco cannot argue that Statewide Rule 48 does not regulate so as to effectuate a legitimate local public interest, that being the protection of the coequal and correlative rights of owners of natural resources in Mississippi.

Therefore, since Statewide Rule 48 regulated evenhandedly to effectuate this legitimate local public interest, and since its effect on interstate commerce, if any, is only incidental, it must be upheld under the *Pike* test.

Transco's argument that Statewide Rule 48 impermissably affects interstate commerce because it would result in higher prices to consumers is not determinative of the Commerce Clause question. First, higher prices to consumers in another state do not render a state's regulation of commerce impermissable under the Commerce Clause. *Cities Service Company v. Peerless Oil and Gas Company*, 340 U.S. 179, 186-87 (1950). Secondly, Congress has declared that all reasonable costs of production of deregulated natural gas shall be borne ultimately by the consumer. This is one of the fundamental policy determinations underlying the Natural Gas Policy Act of 1978. See, *e.g.*, *Public Service Commission v. Mid-Louisiana Gas Co.*, —U.S.—, 77 L.Ed.2d 668, 103 S.Ct. — (1983) (costs of providing production and incentives are plainly to be shouldered by down stream consumers, not pipelines). Thus, as pointed out by the Mississippi Supreme Court in its decision, "whether increased prices to consumers may be fairly characterized as an incidental burden upon interstate commerce, we find it persuasive that Congress within the scope of its power under the affirmative Commerce Clause has expressly authorized its increases." *Transcontinental Gas Pipeline*, *supra*. at page 1321.

Moreover, the burdens on interstate commerce caused by Statewide Rule 48 as set forth by Transco are in reality, nothing but speculative and hypothetical examples of an imagined burden on interstate commerce, and such speculative and hypothetical possibilities are not sufficient to challenge a state regulation under the Commerce Clause. *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, —U.S.— 76 L.Ed.2d 1, 17-18, 103 S.Ct. — (1983).

Finally, and most importantly, any burdens resulting to Transco's operations in interstate commerce by enforcement of Statewide Rule 48 are not the result of Statewide Rule 48, which simply requires that whatever gas the pipeline takes from a common source be taken ratably, but rather are the result of Transco's contracts with the producers herein. As has been previously stated, Statewide Rule 48 does not require a pipeline company to purchase any set volumes of gas. It is free to take any amount it desires from a well so long as it takes ratably from all producers in the well. It is Transco's contracts with the producers that determine the amount of gas it must take. These contracts were voluntarily entered into by Transco with full knowledge of Statewide Rule 48 and the Natural Gas Policy Act of 1978. And this Court has numerous times held that the Commerce Clause does not protect interstate *firms* from the impact of state regulations when the flow of interstate commerce is not affected. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981); *Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).*

In the *Exxon* case, the State of Maryland enacted a statute forbidding refiners and producers of petroleum products from operating their own stations within the state. If Exxon wished to sell its products in Maryland, such products were required to be sold by independent service

stations. Exxon was required to divest itself of the stations which it operated itself. Exxon and the other refiners/producers so affected charged that the Maryland statute violated the Commerce Clause.

Noting that the Maryland statute would have no impact on the flow of interstate commerce, this Court, stated, "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 126. Responding to Exxon's claim that Maryland had interfered with the natural functioning of the interstate markets through burdensome regulation, this Court replied that it could not accept Exxon's argument that the Commerce Clause "protects the particular structure or methods of operation in a retail market." *Id.* at 127. It is exactly this argument that Transco makes when it asks this Court to consider the specific terms of its contract with Getty in determining the Commerce Clause issue, and this Court has held that it will not do so.

Similarly, in the *Cloverleaf* case, this Court held that a Minnesota statute banning retail sales of milk in plastic jugs, but permitting sales of milk in paper cartons, was not violative of the Commerce Clause. Noting that the statute did not affect the flow of interstate commerce, the Court followed its decision in the *Exxon* case, and held that the Commerce Clause "protects the interstate market, not paticular interstate firms, from prohibitive or burdensome regulations." *Minnesota v. Cloverleaf Creamery Co., supra.* at page 474, qu oting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978).

As the Mississippi Supreme Court has so succinctly stated in its opinion herein, any burdens resulting from

enforcement of Statewide Rule 48 fall only on Transco and not on the interstate market:

> The fundamental flaw in Transco's reasoning on the burden point is that it seems to be talking much more about a burden upon Transco than a burden upon interstate commerce. The burden upon Transco appears traceable to its contract with Getty, not to Rule 48. That contract is one that Transco freely and voluntarily entered with Getty. It is had to see how a ratable take rule or order could be said to generate an unreasonable burden on interstate commerce when the only thing requiring Transco (or any other interstate pipeline) to take at all, ratably or otherwise, is its own contract.

Transcontinental Gas Pipeline, 457 So.2d 1322.

Transco also argues that the State of Mississippi has an alternative method to achieve its stated purpose. However, Transco has failed to show that the burden imposed on interstate commerce by enforcement of Statewide Rule 48 is "clearly excessive in relation to the putative local benefits". Therefore, under the *Pike* test, it is not necessary to consider other alternatives, and Statewide Rule 48 being one that regulates evenhandedly to effectuate a legitimate public interest and one whose effect on interstate commerce are incidental, must be upheld. *Pike, supra.* at 178.

CONCLUSION

All the challenges raised by Transco to Statewide Rule 48 must fail in light of clear Congressional intent and previous decisions of this Court. There is, therefore, no substantial question of federal law which has not previously been settled by this Court and/or Congress and Transco's appeal herein should be dismissed, or in the alternative, the decision of the Mississippi Supreme Court should be affirmed.

Respectfully submitted,

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